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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. ..155..

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Corporation,
Petitioner,

vs.

SELENE R. SMITH,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Fifth Circuit

and

SUPPORTING BRIEF.

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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit.

To the Honorable, the Chief Justice, Fred M. Vinson, and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Your Petitioner shows unto this Honorable Court as follows:

1.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. Petitioner filed its bill for declaratory judgment in the United States District Court, Northern District of Alabama, against Selene R. Smith (R. 1-10) seeking a

declaration that policies numbered 1129980 and 81 issued to Sumpter Smith, effective October 14, 1933, have matured as death claims, subject to the terms thereof, including the "Exclusion of Aviation Hazard" provisions thereof (R. 3) to the effect that if any claim should arise under said policies by reason of the death of the insured "and if such death shall have resulted directly or indirectly from operating, or being in or on, or riding in, any kind of aircraft, whether as passenger, or otherwise," the liability of petitioner would be limited to the reserve less any indebtedness.

2. The bill was amended (R. 44), averring that there was no action pending upon the policies and that if petitioner was "required to await uncertain future action by the defendant on said policies plaintiff will be subjected to the hazard of the disappearance of its witnesses and the loss of its evidence, all to its great peril and irreparable injury." The bill was further amended (R. 45-46) averring that a petition to probate the will had been filed by respondent and letters issued to her and that a final finding of death had been made by the War Department and the effect thereof under the Alabama Act of July 7, 1945—Acts 1945, p. 499.

3. Respondent moved to dismiss, answered and demanded a jury (R. 11-21), then amended her answer and motion (R. 49-50), averring among other things "that said policies of insurance are in full force and effect—that she was asserting no claim against the plaintiff thereon, but she reserves full right to assert such claim as she—may be entitled."

4. The case was submitted to the jury on three special interrogatories (R. 227), viz.:

1. Is the insured Walter S. Smith dead?

2. Did the insured, Walter S. Smith's, death result directly or indirectly from being in or on, or

riding in, any kind of aircraft, whether as a passenger or otherwise?

3. Upon what date did the insured, Walter Sumpter Smith, die?

The trial court gave the affirmative charge for petitioner on interrogatory #1. The jury found for petitioner on #2 and fixed the date of death as January 24, 1943, in answer to #3.

5. The court, following the jury's verdict, entered its Findings, Conclusion and Judgment (R. 238-242), declaring the policies matured as death claims subject to the "Exclusion of Aviation Hazard" provision and determining the amount due respondent.

6. Respondent appealed. On May 4, 1948 the Circuit Court of Appeals, Fifth Circuit, dismissed the complaint. **Selene R. Smith v. Massachusetts Mutual Life Insurance Company**, 167 Fed. (2d) 990. On May 21, 1948 application for rehearing was filed. The opinion was extended, but the rehearing denied on June 4, 1948.

7. The insured, a Colonel in the Air Corps (R. 30) traveling under secret orders (R. 30), disappeared on January 24, 1943 on a plane flight from Puerto Rico to Trinidad. Respondent in a letter of February 3, 1943 to the Veterans' Administration, substantially summed up the circumstances as to the insured's disappearance, as follows (R. 29):

> "My husband, Colonel Walter Sumpter Smith (o-183664), was a passenger on board a C-47 Airplane #41-38688, which airplane departed from Borinquen Field, San Juan, Puerto Rico, on the morning of January 24, 1943, destined for Waller Field, Trinidad. This airplane was last sighted by another airplane at about 11:30 A. M., January 24, 1943, at which time the airplane in which my husband was traveling was on course, on time, and about to enter a cloud bank.

> Subject airplane and the occupants thereof have not been seen or heard from since that time."[1]

The insured was first reported missing on January 27, 1943 (Ex. 1, R. 43), then as dead by wire of March 4, 1943 (R. 32), which wire was confirmed by letter of March 9, 1943 (R. 33-34). After receipt of the letter of March 9, 1943 (R. 33), respondent intervened with the War Department to have the Department's finding of "death" changed to one of "missing" (Interrogatory 13, R. 24, and Answer, R. 39. Respondent's testimony, R. 185). On April 26, 1943, Lt. Col. C. A. Scott, at Morrison Field, West Palm Beach, made report changing the status of Col. Smith from "dead" to "missing" (Plaintiff's Exhibits 32 and 33, War Dept. Records, pp. 21-24). Following this change, there was a complete review of the matter (Plf.'s Exs. 35 to 49, War Dept. Records, pp. 26-45) and an extended report with a determination of the status of the crew and passengers of the plane (Ex. 52, pp. 69 to 78, War Dept. Records) recommending that no action be taken on the change of status reported in (Lt. Col. Scott's) letter of April 26, 1943, and that the status of personnel be determined as "died 24 January, 1943" (R. 76).

On March 25, 1944, the Adjutant General made a final finding of death (R. 19-21) revoking the report of death as of January 24, 1943, thereby putting the insured in a "Missing" status for twelve months and fixing a presumptive date of death as of January 25, 1944, for the termination of pay and allowances (R. 20). Respondent has been paid pursuant to that letter (Answer to Interrogatory 23, R. 40, and her testimony, R. 185).

In November, 1943, Respondent met Petitioner's agent, Drake, at her attorney's office, at which time she exhibited to the agent the various communications which she had re-

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[1] See also facts recited in **Barringer v. Prudential Insurance Co.**, 62 F. Supp. 286, 153 Fed. (2d) 224, respecting disappearance of Major Barringer, a co-passenger (Plf's. Ex. 26, at p. 6, War Dept. Records).

ceived from the War Department (R. 153 and 155), including the telegram of March 4, 1943 (Ex. 2, R. 32), and the letter of March 9, 1943 (Ex. 4, R. 218) (R. 154-155). Mr. Drake assisted her in making up the proof of death for his own company as well as for The Protective Life and The Prudential Insurance Companies. Mrs. Smith signed these proofs (R. 181).

The sworn proof of death executed by respondent and furnished to petitioner recites (Plf. Ex. 7—original certified):

3. (a) Date of death. (a) January 24, 1943.
   (b) Place of death. (b) Unknown (theatre of war) Carribean.

The sworn proof of death by respondent to Prudential recites (Plf's Ex. 1—original certified):

5. (a) Date of death. As by War Department notice January 24, 1943.
   (b) Place of death. Carribean theatre of war.
   (c) Cause of death. Presumed to be and declared U. S. Govt. from falling aircraft.

The sworn proof of death by respondent to Protective recites (Plf's. Ex. 11—original certified):

3. (a) Source from which date of death obtained? (a) War Department notice of death.
4. (a) Date and place of death. (a) Death 1/20/43. Place in theatre of war (Carribean).
4. (b) Cause of death. (b) Plane accident as per U. S. Government.

Mrs. Smith knew at the time she filed the several sworn proofs of death that Col. Scott's finding of missing had been changed back to that of death (R. 185). She is collecting the proceeds of the life policy issued by Prudential (R. 79)

as well as that issued by Protective (R. 98). She had no reason to question the correctness of the War Department records (R. 183). She knew that the aviation riders were on the policies when she executed the proof (R. 187). The proofs were correct, based on what she knew (R. 187). On November 2, 1943, Mrs. Smith filed her sworn petition in the Probate Court of Jefferson County, Alabama, to probate the Will of her husband (R. 226-227), reciting that "Walter Sumpter Smith, who at the time of his death, . . . departed this life at (in) Latin American area of Atlantic Ocean on or about the 24th day of January, 1943." Letters were granted to her on 22nd February, 1944 (R. 228). Between January 24, 1943, and the date of the proofs, respondent had paid the premiums on these policies (R. 166). On December 15, 1943, she wrote Agent Drake requesting that the company refund these premiums, since they had been paid by her personally and not from funds belonging to her husband's estate (R. 229). Shortly after November 17, 1943, petitioner tendered to the respondent the reserve on the policies, less indebtedness against same; and shortly after March 7, 1944, tendered the amount of the premiums paid subsequent to January 24, 1943 (R. 8 and 9 and 156). These tenders were refused (R. 157 and 14 paragraph of Ans. R. 17). Thereafter respondent demanded of the petitioner a statement of the indebtedness against the policies and tendered the petitioner the amount of the indebtedness on the policies (R. 157 and Ex. 63, R. 230; also Ans., paragraph 19, R. 17). This tender was refused by petitioner (paragraph 19 of bill, R. 6).

2.

BASIS FOR THIS COURT'S JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C. A., Sec. 347).

3.

QUESTIONS PRESENTED.

This petition involves the following questions:

1. Whether under Alabama Acts 1945, page 499, making communications from the War Department prima facie evidence of death, letters and telegrams from the War Department (Ex. 2, R. 32; Ex. 4, R. 218; Ex. 14, R. 224) are prima facie evidence of death where the finding of "death" was changed to "missing," then changed back to one of "death," and particularly whether a final written finding of death from the War Department pursuant to U. S. C. A., 50 App., Sec. 1009 (Appendix B) wherein the insured was found "to be dead," and recited that "death is presumed to have occurred on the 25th day of January, 1944" (R. 222, 223) is prima facie evidence of death under said Alabama Act.

2. Whether letters testamentary are prima facie evidence of death and as admissions have any weight as evidence against the petitioner therefor.

3. Whether sworn proofs of death executed by a beneficiary are prima facie evidence of their recitals and as admissions have any weight as evidence against such beneficiary.

4. Whether admissions of a party have any weight as evidence when not based on personal knowledge of the party.

5. Whether admissions of a party have any weight as evidence where made to parties other than those opposed to the party making such admissions.

6. Whether the Circuit Court erred in holding that the trial court erred in directing a verdict for the petitioner on the issue of death of the insured.

7. Whether the Circuit Court erred in holding that the trial court erred in directing a verdict for the petitioner on

the issue of the death of the insured when the testimony and all the inferences which the jury could justifiably draw therefrom was insufficient to support a different finding.

8. Whether this action for a declaratory judgment to have the policies issued to the insured declared matured as death claims subject to the aviation provisions thereof was prematurely brought, where the insured, an Army Officer, had disappeared in an overseas flight in a land plane and had not been heard from for more than eighteen months prior to the filing of the complaint.

9. Whether the disappearance of the insured was under such circumstances of specific peril as to overcome the presumption of continued life, entitling the petitioner to a declaratory judgment, that policies issued to insured have matured as death claims, subject to the aviation provisions thereof, without the insurer having to await uncertain future action by the beneficiary.

10. Whether an action under the Declaratory Judgment Act is available to determine the status of missing military personnel and thus set at rest contractual rights of others who had previously dealt with such parties.

11. Whether declaratory relief sought on the ground, among others, that the petitioner will be subjected to the hazard of the disappearance of its witnesses and the loss of its evidence will be denied on the ground that such danger no longer exists since petitioner's written evidence and oral testimony is now preserved in the very case in which the relief is denied.

12. Whether the Circuit Court erred in dismissing the complaint for Declaratory relief as prematurely brought.

4.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Your Petitioner Says That the Decision of the Circuit Court of Appeals of the Fifth Circuit:

1. In holding that the Alabama Statute, Acts 1945, p. 499 (appendix A), making written communications from the War Department to the effect that any person in the armed forces is dead prima facie evidence of the death of such person, has no application to the communication of May 18, 1944 (R. 222-223), is erroneous and is probably in conflict with applicable local decisions.

Life & Casualty Ins. Co. v. Bryan, 33 So. (2d) 25 (Ala. App.).

2. In holding that no weight as evidence was to be given to the admission of respondent in taking out letters of administration on the estate of the insured, has decided an important question of local law in conflict with applicable local decisions.

Smith v. Smith, 212 Ala. 522, 103 So. 577.

3. In holding that no weight as evidence was to be given to the admissions in proof of death filed with the insurance companies, has decided an important question of local law in conflict with the applicable local decisions.

Fleetwood v. Pacific Mutual Life Ins. Co., 246 Ala. 571, 21 So. (2d) 696;

Metropolitan Life Ins. Co. v. James, 225 Ala. 561, 144 So. 33.

4. In holding that no weight as evidence was to be given to an admission not based on personal knowledge is in conflict with the decisions of the First and Ninth Circuits.

Ross v. Salminen, 191 Fed. 504 (1);

Reidy v. Myntti, 116 Fed. (2d) 725 (9).

5. In holding that no weight in evidence was to be given to admissions not based on personal knowledge **in a case with a third party,** has decided an important question of local law in conflict with applicable local decisions.

Brown v. Fowler, 133 Ala. 310, 32 So. 584 (22 C. J., p. 410, § 490, Note 92).

6. In holding that no weight in evidence was to be given to admissions not based on personal knowledge **in a case with a third party,** is in conflict with the decisions of the Eighth and Second Circuits.

Parker v. Cushman, 195 Fed. 715 (8);

Morse Dry Dock v. Newson, 155 Fed. 150, p. 155, affirmed 158 Fed. 1021 (2).

7. In holding that the trial judge erred in directing the jury to find the insured dead is in conflict with the decision of the Third Circuit involving a co-passenger with the insured.

Barringer v. Prudential Ins. Co., 153 Fed. (2nd) 224, affirming and adopting opinion in 62 F. Supp. 286.

8. In holding that the trial judge erred in directing the jury to find the insured dead is in conflict with the decisions of the Third and Ninth Circuits on the issue of disappearance while subjected to a specific peril under circumstances sufficient to overcome the presumption of life.

Continental Life Ins. Co. v. Searing, 240 Fed. 653 (3);

Barringer v. Prudential Ins. Co., 153 Fed. (2nd) 224 (3);

Occidental Life Ins. Co. v. Thomas, 107 Fed. (2nd) 876 (9).

9. In holding that the trial judge erred in directing the jury to find the insured dead has decided an important question of local law in a way probably in conflict with

applicable local decisions as stated in Reasons 1, 2, 3, 5 hereof, and in conflict with the decisions of other Circuits, as stated in reasons 4, 6, 7, and 8 hereof.

10. In holding that the trial judge erred in directing the jury to find the insured dead, where the testimony and all the inferences which the jury could justifiably draw therefrom was insufficient to support a different finding, has rendered a decision on a question of Federal procedural law in conflict with the decisions of this Court applicable to the direction of verdicts.

Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 69 L. Ed. 419.

11. In holding that this action should be dismissed as prematurely brought has rendered a decision in conflict with the decisions of the Fourth, Eighth and Tenth Circuits.

Stephenson v. Equitable Life, 92 Fed. (2d) 406 (4);
Columbian National Life v. Foulke, 89 Fed. (2d) 201 (4);
New York Life v. Roe, 102 Fed. (2d) 28 (8);
Monahan v. Mutual Life Ins. Co., 108 Fed. (2d) 841 (10).

12. In holding that the action should be dismissed as prematurely brought has rendered a decision on an important question of Federal law, in respect to the application of the Federal Declaratory Judgment Act, in a way probably in conflict with an applicable decision of this court.

Aetna Life Ins. Co. v. Haworth, 57 S. Ct. 461, 300 U. S. 227, 81 L. Ed. 617.

13. Has decided an important question of Federal Law, as to the office of the Federal Declaratory Judgment Act, in determining the status of missing military personnel, which has not been but should be settled by this Court.

14. In holding that since the written evidence and oral testimony is now preserved by the trial of this case declaratory relief is prematurely sought, on the ground of subjection of petitioner to the hazard of the disappearance of witnesses and the loss of evidence, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Aetna Life Ins. Co. v. Haworth, supra.

15. In holding that the action was prematurely brought in that the insured is not yet known to be dead, nor so presumed by any law binding on the respondent, has rendered a decision in conflict with the decisions of the Third and Ninth Circuits in respect to disappearance under conditions of peril as terminating the presumptions of continued life.

Brownlee v. Mutual Benefit Health & Acc. Assn., 29 Fed. (2nd) 71 (9) and Authorities Reason 8.

16. In holding that the action was prematurely brought in that respondent may learn that her husband, if dead, did not die from an airplane trip and should not be hurried into a res judicata, there being no evidence of continued life or death otherwise than on an airplane trip and the aviation provisions being applicable whether his death resulted "directly or indirectly" from such a trip, has rendered a decision in conflict with the decisions of the First, Second, Third and Fourth Circuits.

Green v. Mutual Benefit Life, 144 Fed. (2nd) 55 (1);
Neel v. Mutual Life, 131 Fed. (2nd) 159 (2);
Barringer v. Prudential Ins. Co., 153 Fed. (2nd) 224 (3);
Order United Commercial Travellers v. King, 161 Fed. (2nd) 108 (4), affirmed 92 L. Ed. 479.

Wherefore, it is respectfully prayed that this Petition be granted and that Writ of Certiorari be issued and directed to the United States Circuit Court of Appeals, Fifth Circuit, commanding that court to certify and send to this court for its review and determination, a full and complete transcript of the records in all proceedings in the case numbered and entitled on its docket #12128, **Selene R. Smith,** Appellant v. **Massachusetts Mutual Life Insurance Company,** Appellee, 167 Fed. (2d) 990, to the end that said decree or judgment of the said Fifth Circuit Court of Appeals may be reversed by this Honorable Court, and the judgment of the District Court affirmed, and that your Petitioner may have such other and further relief in the premises as may seem meet and just.

HARLAN HOBART GROOMS,
Counsel for Petitioner, Massachusetts
Mutual Life Ins Co., a corporation.

SPAIN, GILLON, GROOMS & YOUNG,
Birmingham, Alabama,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

1.

OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals of the Fifth Circuit is reported in 167 Fed. (2d) 990. The decision was handed down on May 4, 1948 (R. 256-260). A rehearing was denied and an extended opinion was rendered on June 4, 1948 (R. 270-272).

2.

JURISDICTION.

Jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code—28 U. S. C. A., section 347.

3.

STATEMENT OF THE CASE.

The principal facts are set forth in the petition under Summary Statement of the Matters Involved, and particularly in paragraph #7 thereof.

4.

QUESTIONS PRESENTED AND STATUTES INVOLVED.

A statement of the questions presented is set forth in the petition under "Questions Presented." The statutes involved appear in the appendix hereof.

5.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals erred:

1. In dismissing the complaint.

2. In holding that Alabama Acts of 1945, p. 499, had no application to letters and telegrams from the War Department, including the final written finding of death from the War Department Dependency Board.

3. In holding that the taking out of administration by the Respondent had no weight in evidence as admissions.

4. In holding that sworn proof of death executed by the Respondent had no weight in evidence as admissions.

5. In holding that admissions of a party are without weight in evidence where not based on personal knowledge of the party.

6. In holding that admissions made to third parties had no weight as evidence in this cause.

7. In holding that the trial court erred in directing verdict for the Petitioner on that issue of the death of the insured.

8. In holding that this action for Declaratory Judgment was prematurely brought.

9. In holding that this action under the Declaratory Judgment Act is not available to determine the status of insured, missing since January 24, 1943.

10. In holding that declaratory relief, sought on the ground, among other things, that the petitioner will be subject to the hazards of disappearance of its witnesses and loss of its evidence will not lie, since such evidence and oral testimony have now been preserved in this case.

11. In holding that insured is not yet known to be dead nor so presumed by any law binding on Respondent.

6.

ARGUMENT.

(a) Alabama Act of 1945, p. 499, Is Applicable to the Communications From the War Department.

As far as we can find the point was not raised in the lower court by objection to evidence or exceptions to the court's charge or otherwise that the finding of death, contained in the certificate of May 18, 1944 (R. 222-223), did not constitute prima facie evidence under the Alabama Statute because it also fixed a presumptive date of death as of the 25th of January, 1944. The War Department first wired respondent on March 4, 1943, that the insured "died January 24th." This was confirmed by letter on March 9, 1943 (R. 33). Respondent intervened with the War Department to have the finding changed to "missing" (R. 184-185). The subsequent proceedings are related in paragraph #7 of the "Summary Statement of the Matters Involved." The communication which the trial court specifically referred to in his oral charge (R. 212) was that addressed to the petitioner on May 18, 1944 (R. 222-223). It will be observed that this finding specifically recites that upon direction and delegation by the Secretary of War, the War Department Dependency Board, as of the 25th of January, 1944, "**finds** Col. Walter S. Smith—O-83664—**to be dead.**" This communication would appear to be in the exact words of the Alabama Act, and the Circuit Court's holding that the fixing of a presumptive date of death rendered the finding without evidential effect would appear clearly erroneous, and is a misapplication of the Alabama Statute and is in conflict with the case of Life and Casualty Insurance Company v. Bryan, 33 So. 2d 25 (Ala. App.). In that case the proof contained the following question: "8. What in your opinion was the cause of death? U. S. Navy—See wire." The lower court

on the issue of death gave the affirmative charge for the insured. The appellate court, in sustaining this ruling, said:

> "If the proof of death made out in the trial below be sufficient, **then that together with the introduction of the policy established a prima facie case** for appellee. Manhattan Life Insurance Co. v. Verneuille, 156 Ala. 592, 47 So. 72. **In our opinion the evidence submitted was amply sufficient to establish the proof of death.** See Jefferson County Burial Society v. Curry, 237 Ala. 548, 187 So. 723. **We find no evidence controverting the prima facie case** established by the pleadings in the state they are before us." (Emphasis supplied.)

If the recited facts established the death for purposes of a recovery on the policy there would appear to be no reason why the communication from the War Department in this case should not have equal effect.

(b) **Letters Testamentary Are Prima Facie Evidence of the Death of the Decedent Under the Alabama Decisions.**

In November, 1943, Respondent filed sworn petition for letters of administration (R. 225-227), averring that the insured, "who at the time of his death (was) an inhabitant of this County, departed this life at (in) Latin-American area of the Atlantic Ocean on or about the 24th day of January, 1943." These letters were not granted until February (R. 228). On both dates respondent knew that Col. Scott's finding of "missing" had been refused (R. 185-186). The Circuit Court of Appeals' holding that the taking out of administration was to be given no weight in evidence as an admission is contrary to Smith v. Smith, 212 Ala. 522, 103 So. 577, where it was said:

"Such letters of administration, or a certified transcript of the record thereof, is admissible, and **is prima facie evidence of the death of the decedent.**" (Emphasis supplied.)

(c) **Proofs of Death Filed by Beneficiary Are Prima Facie Evidence of the Recitals Therein.**

Respondent filed Proofs of death with Petitioner and with two other companies. Her declaration as to death and the manner of death are set out in paragraph #7 of the "Summary Statement of the Matters Involved." The Circuit Court's ruling that the admissions contained in these proofs have no weight as evidence is in conflict with **Fleetwood v. Pacific Mutual Life Insurance Co.**, 246 Ala. 571, 21 So. 696; **Metropolitan Life Insurance Co. v. James**, 225 Ala. 561, 144 So. 33.

In the latter case the Supreme Court of Alabama said:

"Proofs of death furnished by the beneficiary to the insurer in accordance with the terms of the policy are prima facie evidence of the facts therein stated, as against the beneficiary, and, when not explained or rebutted, are conclusive."

In the former case the same court said:

"We also consider the proofs of loss submitted to the other companies direct and positive evidence of suicide, since they are admissions against interest."

The decision is contrary to the general law as announced by this court in **Mutual Benefit Life Insurance Co. v. Newton**, 22 L. Ed. 793, where it said:

"If it (admission in the proof) was sufficient to establish the death of the insured, it was also sufficient to show that the death was occasioned in such a manner as to relieve the Company from responsibility. * * * the preliminary proofs are admissible

as prima facie evidence of the facts stated therein against the insured and on behalf of the Company."

(d) **Admissions of a Party Are to Be Given Weight as Evidence Though Not Based on Personal Knowledge.**

The Circuit Court in holding the admissions with respect to the taking out of letters testamentary and in the filing of the proofs since not based on personal knowledge had no weight as evidence is contrary to the decisions of the First and Ninth Circuits. In **Ross v. Salminen**, 191 Fed. 504 (1), the court held that where the defendant, charged with liability for an injury to the plaintiff, caused by his automobile, stated that the car was his, and was being operated at the time in his behalf, such statement was admissible in evidence against him, whether or not he spoke of his own knowledge of the facts; the Court saying:

> "The admission of the statement, however, is in conformity with universal practice; and it is enough to say that, when a person charged as a defendant makes a statement under circumstances like those at bar, **whether of his own knowledge or not**, it is for him to ascertain the facts, and he makes himself responsible for what he says in reference thereto."

To the same general effect is: **Reidy v. Myntti**, 116 Fed. (2d) 725 (9) (headnote 2).

This is the general law: **Wigmore on Evidence**, Section 1053, page 1222, and **22 C. J. 298**, note 8; **31 C. J. S. 1025**, note 46.

(e) **It Is Immaterial to Whom an Admission Is Made.**

The holding of the Circuit Court that the admissions above referred to were not binding upon the Respondent in this action with a third party is in conflict with the decisions of the Eighth and Second Circuits.

Parker v. Cushman, 195 Fed. 715 (8).

In that case admissions in letters to employees were held admissible in a suit against the defendant by a spectator injured by a lion exhibited by the defendant.

In the case of **Morse Dry Docks Co. v. Munson**, 155 Fed. 150, at 155, opinion affirmed and apparently adopted in 158 Fed. 1021 (2d), it was said:

> "The fact that the admission was made to a third party seems immaterial. It is said in 1 Amer. & Eng. Enc. of Law 675: 'Admissions may be made to the adverse party, or his agent, or to a third person.'"

The Circuit Court's opinion is also in conflict with the Alabama decision of **Brown v. Fowler**, 133 Ala. 310, 32 So. 584, where it was held that a letter written by one of the defendants to a brother of the plaintiff, which letter showed an individual promise by said defendant to pay a note, was admissible in evidence, against said defendant. These decisions state the general rule, 22 C. J. 410; 31 C. J. S. 1023, note 36.

(f) **Insured's Disappearance Under Conditions of Specific Peril Overcame the Presumption of Continued Life.**

The insured disappeared under circumstances of specific peril. He was in a land plane, equipped with one small life raft, no life preservers or food (Exh. 38, page 31, War Dept. Records). The plane was enroute over the open ocean and was last seen entering a cloud bank with a storm front ahead (Exh. 52, p. 69-78, War Dept. Records).

In the case of **Order of United Commercial Travelers v. King**, 161 Fed. 2d 108 (4), affirmed 92 L. Ed. 479, the Circuit Court said:

> "In undertaking an aerial flight over the ocean in a land-based plane, man must reckon with the perils of the sea which are an imminent and real as the unrelenting force of gravity. Just as flight over the land

> brings forth the danger of violent collision with the earth, we have the dangers of the sea in over-water flight. That men may remain alive for varying periods of time before succumbing does not change the picture. We think it a rather violent fiction to say that death, under such circumstances, comes from accidental drowning. Common knowledge and experience fairly shout of the dangers of shock, exposure and drowning when a flight is taken over water in the winter time in a land based plane."

The decision of the Circuit Court in this case is in conflict with the decisions of the Third and Ninth Circuits.

In **Continental Life Insurance Co. v. Searing**, 240 Fed. 653 (3rd), the insured was last seen bathing in the ocean on a cool evening, there being no evidence that the surf was high or the sea rough. In a suit on an accident policy, the court held that the evidence was sufficient to warrant a finding that the insured was dead and that he died by accidental drowning, the court saying:

> "This presumption of life can be met and overcome by proof of circumstances of specific peril to which the person disappearing was subjected."

In **Occidental Life Insurance Co. v. Thomas**, 107 Fed. 2d 876, the insured was last seen while peacefully fishing on a lake, and there was no evidence that he did not land from his boat. The court said:

> " . . . It is not necessary that the proof go so far as to preclude all possible inferences except that of accidental drowning . . . Thomas may be still alive, or if dead, it may be that he died from other than accidental causes; but the facts essential to a recovery need not be established to a moral certainty or beyond a reasonable doubt. This is a situation where, as was said by us in the Brownlee case, supra, the same evi-

dence not only supports the inference of death, but also points to the cause of it."

On the plane with the insured in this case was Major L. B. Barringer (Exh. 26, p. 6, War Dept. Records). His widow sued the Prudential for death benefits. The Insurer defended, denying death and setting up the aviation provision. The Circuit Court of Appeals of the Third Circuit in **Barringer v. Prudential Insurance Company**, 153 Fed. 2d 224, in adopting the District Court's opinion (62 Fed. Supp. 286) found the insured to be dead and after reviewing the decisions on the question of disappearance under conditions of specific peril held the insured had died in an airplane accident and the aviation provisions were applicable.

Notwithstanding the fact that Respondent filed three sworn proofs of death, claiming death and stating the manner thereof, which said proofs of death are prima facie evidence of death; notwithstanding the fact that respondent is now collecting the proceeds of two of these policies (R. 79 and 98) and is receiving the benefits, as a widow, from the War Department (Answer to Interrogatory 23, R. 40, and Testimony, R. 185); notwithstanding the fact that respondent filed **sworn** petition to probate the insured's will, averring that he was dead, and was granted letters testamentary, which letters are prima facie evidence of the death of decedent; notwithstanding the fact that she both orally (R. 187) and in writing (R. 229) requested the petitioner to refund premiums that she had paid personally subsequent to the insured's disappearance, which in itself was an admission the policies had matured as death claims; notwithstanding the War Department's several notices of death, and particularly that of May 18, 1944 (R. 222-223), which are made prima facie evidence under the Alabama Act; notwithstanding the fact that the insured disappeared under circumstances of spe-

cific peril, clearly sufficient to overcome the presumption of continued life; and notwithstanding the fact that immediately following the insured's disappearance there was a thorough search made of the ocean area in which the plane disappeared (Exh. 52, War Dept. Records, pp. 69-78), and more than four years having expired up to the date of the trial without the discovery of any evidence whatever of the continued life of the insured, the Circuit Court has ruled that the trial court was in error in giving an affirmative charge on the issue of death. It is most respectfully submitted that the trial court had no other alternative.

In **B. & O. v. Groeger**, 266 U. S. 521, 69 L. Ed. 419, the Court said:

> "In every case, it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding."

A Major and a Colonel are riding as passengers in the same plane. Each disappeared at the same time under the same circumstances, the former is dead and his death resulted from riding in an airplane, according to the Third Circuit in the **Barringer** case. The fact of the latter's death and the manner in which he met his death is still undetermined, under the opinion of the Circuit Court of Appeals in this case.

(g) The Action Here Involved Was Not Prematurely Brought.

In holding that this action should be dismissed as prematurely brought, it is submitted that the Circuit Court has rendered a decision in conflict with the decisions of the Fourth, Eighth and Tenth Circuits.

In **Columbian National Life Insurance Co. v. Foulke,** 89 Fed. (2d) 201 (4 Cir.), the Court held that though insurer was denying liability it was entitled to a declaration that insured was not **accidentally killed.**

In **New York Life Insurance Co. v. Roe,** 102 Fed. (2d) 28 (8 Cir.), the Court held that the insurer was entitled to a declaration as to whether insured came to his death **by accidental means** within the double indemnity provision though liability was admitted for the face of the policy.

In **Stephenson v. Equitable Life,** 92 Fed. (2d) 406 (4 Cir.), the insurer disavowed liability under the disability and double indemnity provisions; the insured filed a bill for a declaration **that the policy was in full force and effect** and sought recovery for two $50.00 disability installments. Relief was granted. Here respondent claims the policies are in "full force and effect."

In **Monahan v. Mutual Life,** 108 Fed. (2d) 841 (10 Cir.), the insurer sought a declaration to determine **whether the insurer was liable for double indemnity or whether insured's death was suicide,** as to which liability was denied. Relief was granted.

In **Commercial Casualty Insurance Co. v. Humphrey,** 13 F. Supp. 174, in an action by a liability insurer against persons injured in a collision, the Court held that an "actual controversy" was involved, as to the injured person, though he denied that he had or was asserting any claim, where he filed a motion to dismiss the bill and did not deny that he would thereafter seek recovery.

Is Col. Smith dead? Did he die in an airplane accident, within the "exclusion of the aviation hazard" provision? Have the policies matured as a result of his death? If so, is the petitioner's liability limited under the "exclusion of aviation hazard"? Must it accept the tender of the in-

debtedness? Must it accept any premiums that might be offered? For the purpose of a legal claim reserve is it to set up the full death reserve, disregarding the aviation rider? Or the death reserve giving effect to these riders? Or the reserve on the basis that the insured is alive, reduced by the unpaid accruing and untendered premiums? Must it stand by to await some uncertain future action by the Respondent at such time as its witnesses and evidence may have disappeared or have been lost and destroyed? Are the policies in force and effect and on a premium paying basis? Have the policies terminated by the death of the insured? Are the rights of the parties certain in view of the facts presented by the bill? All of these questions, and others as well, make this case peculiarly one for declaratory relief.

We most respectfully submit that the discretion as to granting declaratory relief is one resting primarily with the trial court and not the appellate court. The Appellate Court may correct if there has been an abuse of such discretion. The discretion must be measured in the light of the purposes of the Declaratory Judgment Act, three of which are stated by **Borchard**, page 95, as follows:

> (4) "to make it unnecessary for a plaintiff to act upon his own interpretation of his rights and at his peril as a condition of judicial action, or to forbear from a contemplated but challenged step for fear of incurring loss, thus avoiding the dangerous necessity for leaps in the dark or the alternative timorous surrender of legitimate claims;
>
> (5) "to remove uncertainty and insecurity from legal relations, and thus to clarify, quiet, and stabilize them before irretrievable acts have been undertaken;
>
> (6) "to enable an issue of questioned status or fact on which a whole complex of rights may depend, to be expeditiously determined;"

The purposes of the Declaratory Judgment Act would appear to encompass the very contingencies here enumerated. As for example, it is difficult to understand why an insurer must reject premiums—its very life-blood—or suffer the peril of an estoppel. If the insured is dead, the proceeds, whether of reserve or of principal, is charged with the indebtedness. The sum due under the policies is the balance only. If the insured is alive, the indebtedness is a continuing, interest-bearing obligation. The debt has either matured by death or is a continuing obligation due by the insured, if alive. Speculation is inherent in the present status.

(h) **The Holding That the Action Is Premature Is Probably in Conflict With an Applicable Decision of This Court in Respect to the Federal Declaratory Judgment Act.**

In **Aetna Life Insurance Co. v. Haworth**, 57 S. Ct. 461, 300 U. S. 227, 81 L. Ed. 617, the action was to establish the rights of the parties under certain insurance policies. The Court held that the insurer was entitled to a declaratory judgment as to the existence of **the total and permanent disability** of the insured. If the insurer there was entitled to a declaration as to the **existence of total and permanent disability** of the insured, it would seem that the insurer here is entitled to a declaration as to the **existence of the insured himself and as to how he died.**

There are still thousands of the members of the armed services who are still missing and will continue to be missing. It would seem to be a matter of great importance that this Court should decide whether or not the Federal Declaratory Judgment Act is available for the purpose of determining the status of such personnel. We think that the Alabama Legislature has tried to solve the problem in some measure by the adoption of the act here in-

volved, making communications from the War Department prima facie evidence of death, to the end that a party may not have to wait seven years for a presumption of death. As this statute is now construed by the Circuit Court, if the communication simply states the service man is dead, that constitutes prima facie evidence. If it states he is presumed to be dead, that does not constitute prima facie evidence. If a soldier is dead that fact is generally capable of establishment, and the statute as thus construed would appear to have little, if any, office, and the status of missing personnel must await the seven years absence giving rise to the presumption of death.

(i) **The Circuit Court has Departed From the Accepted and Usual Course of Judicial Proceedings in Holding That Since the Written Evidence and Oral Testimony Is Now Preserved by This Trial, the Hazards of Disappearance of Witnesses and Loss of Evidence No Longer Exists.**

In **Aetna Life Insurance Co. v. Haworth, supra,** this court said:

> "Defendants have not instituted any action wherein the plaintiff would have an opportunity to prove the absence of the alleged disability and plaintiff points to the danger that it may lose the benefit of evidence through disappearance, illness or death of witnesses."

The Circuit Court's statement that the trial has demonstrated the lack of evidence, and that the testimony is now preserved by the trial, is analogous to saying that since one now has money in the bank, he had no occasion to be concerned about saving to begin with. The insurer impales itself by the very operation by which it seeks to protect itself. The petitioner should not be put in such a self-defeating position. For this case to be ruled on this

issue by a determination based on the **present** record evidence, rather than on the situation **initially** existing, is to establish a precedent so sweeping as to be equalled only by the error in which it is cast.

(j) **The Insured Is Presumed to be Dead.**

The Circuit Court says that the insured is not yet known to be dead, nor so presumed by any law binding on the Respondent. As stated, there is no evidence whatever of continued life. The presumption of continued life has been overcome by the circumstances of disappearance under specific peril. The Circuit Court's holding that there is no such presumption is contrary to the decisions in the **Brownlee** (9), **Searing** (3), **Barringer** (3) and **Thomas** (9) cases.

The argument under (f), supra, is applicable here and we request the court to so consider same.

(k) **Petitioner Is Entitled to Declaratory Relief to Determine the Status of Its Policies.**

The Circuit Court says that Respondent should not be hurried into res judicata and that she may yet learn that her husband is living, and if dead, did not die from an airplane accident. Several arguments have been and could be advanced, as was advanced in the **Barringer** case, that the insured did not die from operating or being in or on, or riding in an aircraft. The rider here involved limits the Company's liability where death shall have "resulted directly or indirectly" from operating, being in or on, or riding on any kind of aircraft. To bring the case without this exception, it would appear that it would ultimately have to be shown that the insured reached land safely, after having terminated his air flight. Merely getting into a boat and then drowning, or dying from exposure, would not be sufficient.

In **Green v. Mutual Benefit Life,** 144 Fed. (2d) 55 (1), the Court held that the insured was engaged in an "aerial flight", where insured made a forced landing, became separated from his life raft before he could inflate it, and was drowned. The case followed **Neel v. Mutual Life,** 131 Fed. (2d) 159 (2), where an aviator flew out over the Atlantic and his body was found two weeks later. These cases are the basis of the decision in **Rossman v. Metropolitan,** 71 F. Supp. 592, where the policy contained the provision "directly or indirectly", and where the insured was drowned after leaving his plane some fifty yards from shore.

In **Order of United Commercial Travelers v. King,** 161 Fed. (2d) 108, heretofore quoted from, the insured was seen to be in the ocean for some two hours after his plane landed. In that case the court said:

> "Out of the abundance of wisdom that comes with hind-sight it might have been better to have also inserted the words 'directly or indirectly' in the exclusion clause. Actually such words were not vital here and would have added little to the force of the word 'resulting.' "

Here the policies do contain the words "directly or indirectly." In each of the foregoing cases the insurer prevailed.

Assuming that the insured later is found to be alive, Respondent would then have no claim under these life policies. She has lost nothing. If insured is alive, the tendered indebtedness will, under the automatic premium loan provision, keep the policies in force until February, 1950 (R. 7), and until then he will have all the rights that he has ever had, and unless further premiums are thereafter tendered, he cannot ask for more. If the insured is dead, he is just as dead now as he will be seven years from now. If Respondent has a cause of action, she has

had that cause of action since she first obtained information as to the disappearance of the plane under conditions of special peril. She has since obtained **prima facie evidence** from the grant of letters testamentary and from the notice from the War Department made prima facie under the Alabama Statute. Since **prima facie evidence** of death overcomes any **presumption** of continued life, Respondent has nothing to gain by waiting seven years for a **presumption** of death. She has long had **prima facie evidence** of death. Where is she under any necessity or what does she gain by obtaining a **presumption of death** from seven years absence? There is no need for the latter where the former exists.

This case was not filed until a year and a half after the insured's disappearance, and more than five years has now intervened since that event. After the lapse of such a period, if there is any additional evidence, we can only inquire "where is it?" Where out there in the future does the Circuit Court draw the line pending which petitioner must wait? To say that an adjudication must await some indefinite future date is to divest the Declaratory Judgment Act of its force and significance—the adjudication of rights without awaiting the uncertain future. If respondent had already brought suit under the policies, she could have maintained same. **Continental Life v. Searing**, 240 F. 653 (3); **Occidental Life v. Thomas**, 107 F. 2d 876 (9); **Barringer v. Prudential.** We most respectfully submit that it is hardly conceivable that petitioner could have successfully obtained a dismissal under the authorities referred to on the ground that it was being hurred into a res judicata without evidence. In **Aetna v. Haworth**, 81 L. Ed. 394, the Court said:

> "If the insured had brought suit to recover the disability benefits currently payable under two of the policies there would have been no question that the

> controversy was of a justiciable nature * * * But the character of the controversy and of the issue to be determined is essentially the same whether it is presented by the insured or by the insurer. * * * It is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determining."

Under the Court's present ruling, the whole controversy must be held in abeyance to afford Mrs. Smith the opportunity to establish that her husband is alive, the establishment of which would defeat her case, or to afford the opportunity to prove that he is dead, which fact is admitted, or to permit her at some indefinite future date to discover evidence not now known to exist, and which the lapse of five years has failed to disclose.

We most respectfully submit that this application should be granted to the end that the order of dismissal of the Circuit Court should be set aside and the judgment of the lower court affirmed.

Respectfully submitted,

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Of Counsel.

The undersigned hereby certifies he has served copy of the foregoing petition and supporting brief upon the Hon. James A. Simpson, Attorney of Record for the Respondent.

This the 17 day of July, 1948.

Harlan Hobart Grooms,
One of the Attorneys
for the Petitioner.

APPENDIX.

A.

Alabama Act 1945, p. 499.

"Section 1. That a written notice or communication purportedly from the War or Navy Department, the Adjutant General of the Army, the Secretary of the Navy or other officer charged with the duty of sending such notice or communication to the effect that any person in the Armed Forces of our Country or serving as auxiliary thereto is dead shall be prima facie evidence of the death of such person.

"Section 2. This act shall apply to such notices or communications heretofore sent as well as those which may hereafter be sent."

B.

Relevant Parts of 50 App., §1009.

(Act of March 7, 1942, Public Laws 490, 77th Congress.)

"The head of the department concerned, or such subordinate as he may designate, shall have authority **to make all determinations necessary** in the administration of this Act (Sections 1001-1017 of this Appendix), and for the purposes of this Act (Sections 1001-1017 of this Appendix) **determinations so made shall be conclusive as to death or finding of death,** as to any other status dealt with by this Act (Sections 1001-1017 of this Appendix), **and as to any essential date including that upon which evidence or information is received in such department or by the head thereof. The determination of the head of the department concerned, or of such subordinate as he may designate,**

shall be conclusive as to whether information received concerning any person is to be construed and acted upon as an official report of death. When any information deemed to establish conclusively the death of any person is received in the department concerned, action shall be taken thereon **as an official report of death, notwithstanding any prior action relating to death or other status of such person. If the twelve months' absence prescribed in section 5 of this act (Section 1005 of this Appendix) has expired, a finding of death shall be made whenever information received, or a lapse of time without information, shall be deemed to establish a reasonable presumption that any person in a missing or other status is no longer alive.** Payment or settlement of an account made pursuant to a report, determination, or finding of death shall not be recovered or reopened by reason of a subsequent report or determination which fixes a date of death except that an account shall be reopened and settled upon the basis of any date of death so fixed which is later than that used as a basis for prior settlement. Determinations are authorized to be made by the head of the department concerned, or by such subordinate as he may designate, of entitlement of any person, under provisions of this Act, to pay and allowances, including credits and charges in his account, and all such determinations shall be conclusive: * * * When circumstances warrant reconsideration of any determination authorized to be made by this Act (Sections 1001-1017 of this Appendix) the head of the department concerned, or such subordinate as he may designate, may change or modify a previous determination." (Emphasis supplied.)